Supreme Court, U.S.
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No. 95-887

In the Supreme Court of the United States

OCTOBER TERM, 1995

ROBERT W. WAYMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1346's provision that a fraudulent scheme under the mail fraud statute "includes a scheme or artifice to deprive another of the intangible right of honest services" is unconstitutionally vague as applied to the facts of this case.

2. Whether the court of appeals correctly affirmed the mail fraud conviction of a school board member who failed to disclose the nature of his financial relationship with a vendor of services to the school system where that financial relationship would have been material to the school board in bidding on or negotiating contracts for such services.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 55 F.3d 564.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1995. A petition for rehearing was denied on September 7, 1995. Pet. App. 26a. The petition for a writ of certiorari was filed on December 5, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted on 22 counts of mail fraud, in violation of 18 U.S.C. 1341, and 11 counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i). He was sentenced to concurrent terms of 33 months' imprisonment on each count of conviction. The court of appeals affirmed. Pet. App. 1a-13a.

1. Petitioner Robert W. Waymer was an elected member of the Atlanta Board of Education (the Board). Peatross Service Company, a subsidiary of the Allen Service Company, of which Buddy Allen was the President and General Manager, became a supplier of services to the schools. In 1986, Allen agreed to pay John Assmar, a real estate broker, a 15% commission on the gross proceeds of any service contracts Assmar obtained on behalf of Allen's companies. In 1986, Allen, acting on behalf of Peatross, began a pilot sanitation and pest-control program for two Atlanta public schools. By the 1988-1989 school year, Allen's companies provided pest control and other services to all 113 Atlanta public schools. Pet. App. 1a-2a.

In mid-1988, Assmar died. After Assmar's death, petitioner informed Allen that he and Assmar had been partners and that he wanted to assume Assmar's role in Allen's school system contracts. Allen ultimately agreed to pay petitioner the 15% commission if petitioner provided him with an assurance from the school system that petitioner could do business with him while being a member of the Board. Pet. App. 2a.

Petitioner told Dr. Woodrow Wilson, the Associate Superintendent of the Atlanta school system, that he was considering doing business with a person who did business with the school system. Wilson advised petitioner that such a practice was permissible if the other party's business with the school system was accomplished through a sealed-bid procedure. Wilson further advised that petitioner should abstain from voting on any matters involving that business that came before the Board, and that he should disclose the relationship to the Board and to the Superintendent. Petitioner subsequently wrote to inform Wilson that he was engaged in real estate and marketing activities with Allen, that he had done consulting work for Allen since 1986, and that he would make full disclosure of his relationship with Allen. That letter did not, however, inform Wilson that petitioner would receive a 15% commission on Allen's contracts with the school system without being required to perform substantial services. Neither petitioner nor Wilson took the matter before the entire Board. From 1989 through 1991, petitioner received more than $200,000 in payments from Allen's companies. Pet. App. 2a-3a.

2. The federal mail fraud statute prohibits the use of the mails in furtherance of "any scheme or artifice to defraud." 18 U.S.C. 1341. Before this Court's decision in *McNally* v. *United States*, 483 U.S. 350 (1987), the courts of appeals had consistently construed Section 1341 to apply to schemes intended to deprive citizens of their right to honest services from public officials. See Pet. 8. The Court in *McNally* reached the opposite conclusion, holding that Section 1341 was "limited in scope to the protection of property rights." 483 U.S. at 360. The Court stated that Congress "must speak more clearly than it has" if it

wishes to criminalize a broader range of fraudulent conduct. *Ibid.* The following year Congress amended the Criminal Code to provide that, for purposes of applying the mail fraud statute, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Pub. L. No. 100-690, § 7603, 102 Stat. 4508 (18 U.S.C. 1346).

3. Petitioner was charged with 24 counts of mail fraud, in violation of 18 U.S.C. 1341. The indictment alleged that petitioner had engaged in (1) a scheme to defraud the citizens of Atlanta of petitioner's honest services, and (2) a scheme to defraud Allen of money and property. Petitioner was also charged with 11 counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i), in which the alleged mail fraud constituted the source of the laundered proceeds. Pet. App. 3a.

The district court granted a motion for judgment of acquittal on two of the mail fraud counts. The jury found petitioner guilty on all remaining mail fraud counts based on the scheme to deprive the citizens of Atlanta of petitioner's honest services, but deadlocked on petitioner's guilt regarding the alleged scheme to defraud Allen of money and property. The jury also convicted petitioner on all money-laundering counts. Pet. App. 3a.

4. The court of appeals affirmed. Pet. App. 1a-13a. The court rejected petitioner's argument that Section 1346 is unconstitutionally vague. Pet. App. 5a-6a. It explained that a statute is not unconstitutionally vague if it "define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory

enforcement." *Id.* at 5a (quoting *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983)). Because petitioner's challenge did not involve the First Amendment, the court observed, its inquiry was limited to the question whether the statute was unconstitutionally vague as applied to the facts of the particular case. Pet. App. 5a. The court of appeals rejected the vagueness challenge, stating that a conviction under the mail fraud statute requires specific intent to defraud, and that petitioner had not contested the adequacy of either the jury instructions or the proof on the element of specific intent. *Id.* at 6a.

Petitioner also contended that his nondisclosure of the details of his business agreement with Allen could not form the basis for a mail fraud conviction, because those details were not material facts. Pet. App. 12a. The court rejected that contention, explaining that "[f]or a School Board member to be receiving a direct and substantial cut from a vendor's contract with the school system in exchange for the performance of virtually no services so obviously smacks of impropriety that it can hardly be characterized as a minor detail of which the Board need not be apprised." *Ibid.* Had the Board known that Allen's contracts were inflated by the 15% commission paid to petitioner, the court observed, "it likely would have re-bid the contracts at a considerable savings to the citizens of Atlanta." *Id.* at 12a-13a.

ARGUMENT

1. Petitioner argues (Pet. 7-15) that Section 1346's definition of mail fraud to include the use of the mails "to deprive another of the intangible right of honest services" is unconstitutionally vague, in violation of the Due Process Clause of the Fifth Amendment.

That claim is without merit and does not warrant this Court's review.*

"Due process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal, for 'no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'" *Buckley* v. *Valeo*, 424 U.S. 1, 77 (1976) (quoting *United States* v. *Harriss*, 347 U.S. 612, 617 (1954)). "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender* v. *Lawson*, 461 U.S. at 357. Petitioner attacks Section 1346 as vague based upon its potential to criminalize "common political practices," such as a public official's performance for political gain of an act that imposes unnecessary costs on taxpayers, or a candidate's mailing of a brochure containing a promise the candidate knows he cannot keep. See Pet. 11-12.

Under this Court's precedents, however, petitioner cannot obtain reversal of his convictions by showing that hypothetical situations may exist in which application of the statute would be ambiguous. Rather, he

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* The only other court of appeals to consider a vagueness challenge to Section 1346 has also rejected the claim. See *United States* v. *Bryan*, 58 F.3d 933, 941-942 (4th Cir. 1995). Vagueness challenges were also consistently rejected in pre-*McNally* cases applying the mail fraud statute to schemes to deprive the citizenry of intangible rights. See, *e.g.*, *United States* v. *Margiotta*, 688 F.2d 108 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983); *United States* v. *Bohonus*, 628 F.2d 1167, 1173-1175 (9th Cir.), cert. denied, 447 U.S. 928 (1980).

can prevail only by demonstrating that the statute failed to provide clear warning that his own conduct was proscribed. See *Chapman* v. *United States*, 500 U.S. 453, 467 (1991) ("First Amendment freedoms are not infringed * * *, so the vagueness claim must be evaluated as the statute is applied to the facts of this case."); *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975) ("[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand."); *Parker* v. *Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."). As the court of appeals observed in explaining why petitioner's acts were proscribed by the statute, "[f]or a School Board member to be receiving a direct and substantial cut from a vendor's contract with the school system in exchange for the performance of virtually no services so obviously smacks of impropriety that it can hardly be characterized as a minor detail of which the Board need not be apprised." Pet. App. 12a. Because "a person of ordinary intelligence," *Buckley*, 424 U.S. at 77, would know that petitioner was obligated to disclose the terms of his agreement with Allen, the application of Section 1346 did not violate due process.

2. Petitioner argues (Pet. 15-17) that an essential element of a public official's scheme to defraud based on his failure to disclose an improper financial relationship is that he have "exercised the authority of his office to advance that relationship." Pet. 15. Petitioner asserts that the court of appeals' decision conflicts with the Eighth Circuit's pre-*McNally* ruling in *United States* v. *Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979). In *Rabbitt*,

the majority leader of the Missouri House of Representatives received a ten percent commission from an architectural firm that he recommended for state contracts. He failed to disclose that interest, but he had no responsibility, and took no action, respecting the awarding of those contracts. The Eighth Circuit reversed his mail fraud conviction. The court recognized that "[t]he concept of fraud upon the public may clearly fall within the ambit of the mail fraud statute where dishonest conduct by a public official directly implicates the functions and duties of that official's public office." 583 F.2d at 1024. The court questioned, however, "[w]hether a showing of dishonesty on the part of a state official, outside his official duties, with no financial loss to the state constitutes a fraud upon the public." *Ibid.* The court distinguished other cases as involving fraudulent conduct that "deprived the public either of some potential tangible gain such as favorable contracts, or of its right to honest and fair dealing in the conduct of the officer in question, or of its right to disclosure of the officer's interest in the transaction at issue." *Id.* at 1025 (footnotes omitted).

In the instant case, petitioner failed to disclose crucial aspects of his agreement with Allen despite the Associate Superintendent's instruction that the relationship should be disclosed. The court of appeals observed, moreover, that if petitioner had made the required disclosures, the contracts with Allen's companies would likely have been rebid or renegotiated. Pet. App. 12a-13a. Had petitioner been performing honest services as a School Board member, he would not have concealed from the Board information "strongly suggest[ing] that there were at least fifteen percent of unnecessary expenses in Allen's bids

for the contracts." *Id.* at 12a. Thus, petitioner's failure to make the required disclosures "directly implicate[d] the functions and duties of that official's public office," *Rabbitt*, 583 F.2d at 1024, and "deprived the public * * * of some potential tangible gain such as favorable contracts," *id.* at 1025. Petitioner's reliance (Pet. 16) on *United States* v. *McNeive*, 536 F.2d 1245 (8th Cir. 1976), is similarly misplaced. In *McNeive* a plumbing inspector's acceptance of gratuities for the performance of his duties was held not to violate the mail fraud statute because the defendant "was not derelict in any of his affirmative duties as Chief Plumbing Inspector." *Id.* at 1252. Here, by contrast, petitioner breached his duty as a School Board member to disclose information suggesting the existence of substantial overpayments to a public contractor. Petitioner's claim therefore does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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